

805 KAR 8:060. Criteria for the imposition and enforcement of sanctions against licensed premises.

RELATES TO: KRS 351.010(1)(m), 351.025, 351.1041, 351.175, 351.194, 352.010-352.550

STATUTORY AUTHORITY: KRS 351.025(2), 351.070(13), 351.070(15)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 351.070(13) authorizes the Secretary of the Energy and Environment Cabinet to promulgate administrative regulations necessary and suitable for the proper administration of KRS Chapter 351. KRS 351.025(2) requires the Department for Natural Resources to promulgate administrative regulations that establish comprehensive criteria for the Mine Safety Review Commission's imposition of penalties against licensed premises for violations of Kentucky mine safety laws that place miners in imminent danger of serious injury or death. KRS 351.070(15) requires the Cabinet to promulgate administrative regulations providing for the manner and method of assessing penalties by the Commissioner of the Department for Natural Resources against licensed facilities for violations of KRS Chapters 351 and 352 that relate to roof control plans, mine seal construction plans, unsafe working conditions and mine ventilation plans that could lead to imminent danger or serious physical injury. This administrative regulation establishes the criteria for the revocation, suspension, or probation of a mine's license, and the imposition of civil monetary penalties against a licensed premises.

Section 1. Definitions. (1) "Commission" means the Mine Safety Review Commission.

(2) "First offense" means the first violation by a licensed premises of a mine safety law that places a miner in imminent danger of serious physical injury or death, as adjudicated by the Mine Safety Review Commission, including:

(a) Failure to comply with the reporting requirements set forth in KRS 352.180(1);

(b) The violation of a roof control plan, mine seal construction plans, or mine ventilation plan; or

(c) Violations pertaining to unsafe working conditions that may lead to imminent danger or serious physical injury.

(3) "Licensed facility" or "licensed premises" means "licensee", as defined by KRS 351.010(1)(o) and 352.010(1)(s).

(4) "Mine ventilation plan" means the ventilation plan, including any revisions as approved by the United States Mine Safety and Health Administration.

(5) "Related successor" means an entity that obtains a license for a mine, if that entity is linked by common legal or equitable ownership through one (1) or more owners, to a previous licensee for that same mine or location.

(6) "Second offense" means the second violation by a licensed premises of a mine safety law that places a miner in imminent danger of serious physical injury or death, as adjudicated by the Mine Safety Review Commission, including:

(a) Failure to comply with the reporting requirements set forth in KRS 352.180(1);

(b) The violation of a roof control plan, mine seal construction plans, mine ventilation plan; or

(c) Violations pertaining to unsafe working conditions that may lead to imminent danger or serious physical injury.

(7) "Subsequent offense" means a violation beyond the third offense by a licensed premises of a mine safety law that places a miner in imminent danger of serious physical injury or death, as adjudicated by the Mine Safety Review Commission, including:

(a) Failure to comply with the reporting requirements set forth in KRS 352.180(1);

(b) The violation of a roof control plan, mine seal construction plans, mine ventilation plan;
or

(c) Violations pertaining to unsafe working conditions that may lead to imminent danger or serious physical injury.

(8) "Third offense" means the third violation by a licensed premises of a mine safety law that places a miner in imminent danger of serious physical injury or death, as adjudicated by the Mine Safety Review Commission, including:

(a) Failure to comply with the reporting requirements established in KRS 352.180(1);

(b) The violation of a roof control plan, mine seal construction plans, mine ventilation plan;
or

(c) Violations pertaining to unsafe working conditions that may lead to imminent danger or serious physical injury.

(9) "Unsafe working conditions" means a condition that involves a hazard that:

(a) Can reasonably be expected to cause a miner serious injury or death;

(b) A foreman, superintendent or mine management was aware of or should have been aware of; and

(c) Was allowed to exist, without being corrected or addressed.

Section 2. Criteria for the Imposition and Enforcement of Sanctions Against Licensed Premises for Violations of Mine Safety Laws. (1)(a) If the Commission determines, pursuant to KRS 351.194, that a licensed premises has committed a first offense, the commission may place the licensed premises on probation for a period of time to be determined by the commission, pursuant to KRS 351.194(5), which shall be in proportion to the seriousness of the violations and the facts of the case.

(b) The commission may also impose a civil monetary penalty against the licensed premises, in accordance with KRS 351.025(2) and the factors established in KRS 351.194(7).

(2)(a) If a licensed premises is placed on probation for a first offense violation pursuant to subsection (1) of this section, the commission may impose the terms of the probation, and it may impose penalties for the violation of the terms of probation, including the suspension or revocation of the mine's license.

(b) If the licensed premises satisfies the terms of its probation, the probation shall automatically expire at the end of the probationary period.

(3)(a) The department may file charges against a licensed premises for any alleged violation of its probationary terms.

(b) Hearings regarding the allegations shall be conducted by the Kentucky Mine Safety Review Commission, pursuant to 825 KAR 1:020.

(4)(a) If the Commission determines, pursuant to KRS 351.194, that a licensed premises has committed a second offense, the commission may suspend or revoke the mine's license for a period of not less than two (2) calendar years, up to and including revocation, pursuant to KRS 351.194(5) and (6), and in proportion to the seriousness of the violations and the facts of the case.

(b) The commission may also impose a civil monetary penalty against the licensed premises, in accordance with KRS 351.025(2) and the factors established in KRS 351.194(7).

(5)(a) If a mine license is suspended for a second offense violation pursuant to subsection (4) of this section, it shall be automatically reinstated at the end of the period of suspension.

(b) If the mine's license is revoked, the licensed premises may apply to the Office of Mine Safety and Licensing for the reinstatement of its mine license at the end of the revocation period.

(c) The Office of Mine Safety and Licensing may grant or deny the application. The office

shall grant the application only if the licensed premises is in full compliance with orders of the Mine Safety Review Commission and KRS 351.175.

(6)(a) Upon the adjudication by the Mine Safety Review Commission of a third offense by a licensed premises, the commission shall revoke the mine's license for a period of not less than three (3) calendar years, up to and including a permanent revocation without possibility of reinstatement, pursuant to KRS 351.194(5) and (6) and in proportion to the seriousness of the violations and the facts of the case.

(b) If the revocation is for a period of less than a permanent revocation without possibility of reinstatement, the licensed premises may apply to the Office of Mine Safety and Licensing for the reinstatement of its mine license at the end of the revocation period.

(c) The Office of Mine Safety and Licensing may grant or deny the application. The office shall grant the application only if the licensed premises is in full compliance with orders of the Mine Safety Review Commission and KRS 351.175.

(d) If a third offense is committed by a licensed premises, the commission may also impose a civil monetary penalty against the licensed premises, in accordance with KRS 351.025(2) and the factors established in KRS 351.194(7).

(7)(a) If a licensed premises commits a violation of a mine safety law that results in the death of a miner, whether the violation is first or subsequent offense, the Mine Safety Review Commission may suspend or revoke the mine's license, including permanent revocation of the license without the possibility for reinstatement, pursuant to KRS 351.194(5) and (6) and in proportion to the seriousness of the violations and the facts of the case.

(b) If the commission suspends the mine's license, it shall be automatically reinstated at the end of the period of suspension.

(c) If the commission revokes the mine's license for a period of less than a permanent revocation possibility of reinstatement, the licensed premises may apply to the Office of Mine Safety and Licensing for the reinstatement of its mine license at the end of the revocation period.

(d) The Office of Mine Safety and Licensing may grant or deny the application. The office shall grant the application only if the licensed premises is in full compliance with Orders of the Mine Safety Review Commission and KRS 351.175.

(e) The commission may also impose a civil monetary penalty against the licensed premises, in accordance with KRS 351.025(2) and the factors established in KRS 351.194(7).

(8) If a licensed premises that has committed one (1) or more violations pursuant to subsection (1), (4), (6), or (7) of this section is subsequently sold or goes out of business, penalties imposed on that licensed premises for those violations shall be imposed upon an entity that is determined by the commission to be a related successor to the licensed premises in question, after a hearing conducted pursuant to KRS 351.194.

Section 3. Criteria for the Imposition and Enforcement of Civil Penalties Against Licensed Facilities for Violations of Roof Control Plans, Mine Seal Construction Plans, Unsafe Working Conditions, or Mine Ventilation Plans. (1) Amount of penalty. The commissioner or the commissioner's designee shall assess monetary penalties to a licensed facility that has been issued a noncompliance or closure order for a violation of the provisions of KRS Chapters 351 and 352 relating to roof control plans, mine seal construction plans, unsafe working conditions, and mine ventilation plans that may lead to imminent danger or serious physical injury, or have resulted in serious physical injury or death, as follows:

(a) If the licensed facility has not had previous violations during the previous twenty-four (24) months relating to roof control plans, mine seal construction plans, unsafe working conditions, or mine ventilation plans that may lead to imminent danger or serious physical injury, the penalty shall not be more than \$2,500;

(b) If the licensed facility has had one prior offense during the previous twenty-four (24) months relating to the violation of the roof control plans, mine seal construction plans, unsafe working conditions, or mine ventilation plan that resulted in the assessment of a penalty pursuant to this section, the penalty for a violation that may lead to imminent danger or serious physical injury shall not be more than \$4,000;

(c) If the licensed facility has had two (2) or more offenses relating to a violation during the previous twenty-four (24) months of the roof control plans, mine seal construction plans, unsafe working conditions, or mine ventilation plan that resulted in an assessment of a penalty pursuant to this section, the penalty for a violation that may lead to imminent danger or serious physical injury shall not be more than \$5,000;

(d) If the violation of the roof control plans, mine seal construction plans, unsafe working conditions, or mine ventilation plan results in the serious physical injury or death of a miner, the penalty shall be \$5,000, even if the licensed facility has been previously cited for the violation or assessed a penalty pursuant to this section; and

(e) Factors to be considered. In determining the amount of the penalty to be assessed, consideration shall be given to the following:

1. The licensed premises' cooperation with investigators;
2. The severity of the harm done, such as whether the violation resulted in:
 - a. Death;
 - b. Serious physical injury; or
 - c. The placement of an individual in imminent harm;
3. The licensed premises' acceptance of responsibility for its actions;
4. The licensed premises' history of violations;
5. Mitigating circumstances; and
6. Aggravating circumstances.

(2) Notification. The commissioner or commissioner's designee shall notify a licensed facility that has been assessed a penalty pursuant to this section of the amount of the assessment.

(3) Service.

(a) The notice of proposed penalty assessment shall be served on the licensed facility within thirty (30) days after the proposed penalty assessment is completed.

(b) Failure to serve the proposed assessment within thirty (30) days shall not be grounds for dismissal of all or part of the assessment unless the licensee proves actual and substantial prejudice as a result of the delay.

(c) Service shall be made by one (1) or more of the following methods:

1.a. The commissioner or the commissioner's designee may place a copy of the notice of proposed assessment in an envelope and address the envelope to the licensed facility at the address provided by the licensee to the Office of Mine Safety and Licensing in its most recent license application.

b. The Office of Mine Safety and Licensing shall affix adequate postage and place the sealed envelope in the United States mail as certified mail return receipt requested.

c. The Office of Mine Safety and Licensing shall maintain a record of each assessment and shall include the fact of mailing and the return receipt, if received.

d. If the envelope is returned with an endorsement showing failure of delivery, that fact shall be entered in the record.

e. Service by certified mail shall be complete upon delivery of the envelope, upon acceptance by any person eighteen (18) years of age or older at the licensee address, upon refusal to accept by any person at the licensee address, upon the United States Postal Service's inability to deliver the assessment if properly addressed to the licensee, or upon failure to claim the assessment prior to its return to the Office of Mine Safety and Licensing by the United

States Postal Service.

f. The return receipt shall be proof of acceptance, refusal, inability to deliver, or failure to claim the assessment; or

2. The commissioner or the commissioner's designee may cause the assessment, with necessary copies, to be transferred for service to a person authorized by the Secretary who shall serve the assessment, and the return thereon shall be proof of the time and manner of service.

(4) Options of the licensed facility issued a notice of proposed assessment.

(a) Waiver.

1. A licensed facility that is issued a notice of proposed assessment may choose not to contest the assessment.

2. Failure to file a petition pursuant to paragraph (b) of this subsection shall be considered a waiver.

3. A final order shall be entered by the Mine Safety Review Commission finding that:

a. The licensed facility has waived its right to an administrative hearing on the amount of the proposed assessment;

b. The fact of the violation cited in the noncompliance or closure order is deemed admitted;

c. The proposed penalty is due and payable within thirty (30) days after the entry of the final order; and

d. The violation is a first, second, third, or subsequent offense.

(b) Petition for administrative hearing. The licensed facility may contest the proposed assessment and fact of violation by submitting a petition for administrative hearing within thirty (30) days of the receipt of the assessment in accordance with 825 KAR 1:020.

(5) This section of this administrative regulation shall not be construed to impair or contravene the Office of Mine Safety and Licensing's authority to seek sanctions pursuant to Section 2 of this administrative regulation or to prevent the Mine Safety Review Commission from imposing the sanctions in Section 2 of this administrative regulation in addition to the monetary penalties assessed pursuant to this section.

Section 4. Criteria for the Imposition and Enforcement of Sanctions Against Licensed Facilities For Failure to Comply with the Requirements for Reporting an Accident. (1) General.

(a) If the superintendent, mine manager, mine foreman, or a mine foreman's designee fails to comply with the reporting requirements established in KRS 352.180(1), the Mine Safety Review Commission may revoke, suspend or probate the mine license for a period of time to be determined by the commission, pursuant to KRS 351.194(5), and in proportion to the seriousness of the violations and the facts of the case.

(b) The commission shall also assess a civil monetary penalty against the licensed premises in accordance with KRS 352.180(4).

(2) Point system for computing the civil monetary penalty. The Mine Safety Review Commission shall apply the point system described in this subsection to evidence produced by the Office of Mine Safety and Licensing necessary to determine the amount of civil monetary penalty to assess against the licensee pursuant to this section. Points shall be assigned as follows:

(a) Appropriateness of the penalty.

1. Up to fifteen (15) points shall be assigned for the size of the mine.

2. The size of the mine shall be based on the tonnage produced from the mine in the previous calendar year, or in the case of a mine opened or owned less than one (1) full calendar year, the tonnage prorated to an annual basis.

3. Points shall be assigned as follows:

a. 0-300,000 tons, zero (0) points;

- b. 300,000-500,000 tons, five (5) points;
- c. 500,000-1 million tons, ten (10) points;
- d. Over 1 million tons, fifteen (15) points;
- (b) History of previous violations.

1. Up to twenty (20) points shall be assigned based on the history of violations at the mine, cited against the licensee during the preceding twenty-four (24) month period.

2. Points shall be assigned as follows:

- a. 1-5 previous violations, zero points;
- b. 6-10 previous violations, five (5) points;
- c. 11-20 previous violations, ten (10) points;
- d. 21-30 previous violations, fifteen (15) points;
- e. Over 30 previous violations, twenty (20) points;

(c) Negligence.

1. Up to twenty-five (25) points shall be assigned based on the degree of negligence the licensee exhibited in failing to report the accident.

2. Points shall be assigned as follows:

a. No negligence. There shall not be negligence on the part of the licensee if it exercised diligence and could not have prevented the failure to comply with the reporting requirements. Zero points shall be assigned for no negligence;

b. Negligence. There shall be negligence if the licensee has mitigating circumstances for its failure to comply with the reporting requirements. Fifteen (15) points shall be assigned for negligence; or

c. Reckless disregard. There shall be reckless disregard if the licensee exhibits the absence of the slightest degree of care in complying with the reporting requirements. Twenty-five (25) points shall be assigned for reckless disregard;

(d) Gravity. Gravity shall be the severity of the accident and whether persons were at risk of serious physical injury or death based on the failure to comply with the reporting requirements.

1. A total of thirty (30) points shall be assigned for gravity.

2. Points shall be assigned as follows:

a. Severity. Up to twenty (20) points shall be assigned as follows for the severity of injuries:

(i) No serious physical injury occurred, zero points;

(ii) A serious physical injury occurred, ten (10) points; or

(iii) A fatality occurred, twenty (20) points; and

b. Persons at risk of serious physical injury or death. Up to ten (10) points shall be assigned based on whether persons were at risk of serious physical injury or death by the failure to comply with the reporting requirements, and points shall be assigned as follows:

(i) Personnel were not at risk, zero points; or

(ii) A person was at risk, ten (10) points.

(3) Determination of amount of penalty. The Mine Safety Review commission shall determine the amount of penalty by converting the total number of points assigned under subsection (2) of this section to a dollar amount, according to the schedule in the following table:

POINTS	AMOUNT
0	\$10,000
5	\$15,000
10	\$20,000
15	\$25,000
20	\$30,000
25	\$35,000
30	\$40,000

35	\$45,000
40	\$50,000
45	\$55,000
50	\$60,000
55	\$65,000
60	\$70,000
65	\$75,000
70	\$80,000
75	\$85,000
80	\$90,000
85	\$95,000
90	\$100,000

(4) Waiver of use of point system to determine civil penalty.

(a)1. The Mine Safety Review Commission may waive the use of the point system contained in Section 4(2) of this administrative regulation to set the civil penalty, if it determines that, taking into account exceptional factors present in the particular case, the penalty is demonstrably unjust.

2. The basis for every waiver shall be fully explained and documented in the record of the case.

(b)1. If the commission waives the use of the point system, it shall use the criteria established in KRS 351.194(7) to determine the appropriate penalty.

2. If the commission has elected to waive the use of the point system, it shall give a written explanation for the basis for the assessment made in its Final Order.

Section 5. Incorporation by Reference. (1) "Notice of Proposed Assessment," July 12, 2006, OMSL Form No. NPA-1, is incorporated by reference.

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Office of Mine Safety and Licensing, 300 Sower Boulevard, Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m. (28 Ky.R. 2132; Am. 29 Ky.R. 716; eff. 9-16-2002; 33 Ky.R. 560; 1341; eff. 12-7-2006; TAm eff. 3-24-2008; 36 Ky.R. 660; 1222; eff. 12-11-2009; 37 Ky.R. 165; 727; eff. 9-2-2010; TAm eff. 7-6-2016.)